BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2004-178-E

In re:	
South Carolina Electric & Gas Company—Application for Adjustments in the Company's Electric Rate Schedules and Tariffs	**COLUMBIA ENERGY LLC'S REPLY TO MOTION TO STRIKE OF SCE&G**

SCE&G has filed a motion seeking to strike certain testimony pre-filed by Columbia Energy LLC ("Columbia Energy") in this docket. Columbia Energy submits this memorandum to demonstrate that the testimony in question meets the standards for admissibility of R.103-870 of this Commission's Rules of Practice and Procedure. The testimony is directly relevant to issues which are presented by the application of SCE&G. SCE&G's motion is based on a misreading of South Carolina precedent on the doctrines of the "law of the case" and collateral estoppel. The motion should be denied.

I. BACKGROUND

On July 1, 2004, SCE&G filed an application seeking a rate increase designed to produce an additional $81 million in revenues. As part of the application SCE&G describes several items which it "proposes" for the consideration of the Commission. Included among these proposals is the inclusion of the capital costs of the Jasper Generating Station in the rate base. By this proposal SCE&G seeks to have included in the rate base the remaining 42% of the costs of the Jasper plant which were not

approved for inclusion in the rate base in Docket No. 2002-223-E. Columbia Energy has filed testimony opposing the inclusion of the remaining 42% of the Jasper costs. By its motion SCE&G attempts to prevent Columbia Energy from being heard on this issue which is central to this proceeding.

The Jasper facility was first considered by this Commission in Docket No. 2001-420-E. That proceeding was initiated by an application filed by SCE&G under the Utility Facility Siting and Environmental Protection Act which was passed by the General Assembly in 1971. S.C. Code § 58-33-10 *et seq.* The Siting Act requires an application be filed before a utility can commence the construction of a "major utility facility." S.C. Code § 58-33-110. With respect to such an application the Siting Act requires that notice be given to local governments in the area where the proposed facility will be located as well as conservation and historical preservation groups. S.C. Code § 58-33-120. The Act also provides that the Department of Health and Environmental Control, the Department of Natural Resources, and the Department of Parks, Recreation and Tourism are all to be parties to the proceedings. S.C. Code § 58-33-140. Proceedings under the Siting Act address the projected need of the proposed facility and its potential impacts across a wide range of perspectives. S.C. Code § 58-33-160. There is no discussion in the Siting Act about the impact of proposed facility on utility rates and there is certainly no provision in the Act that requires that funds spent on facilities approved under its provisions will automatically be included in the utility's rate base for recovery from ratepayers.

The Siting Act application of SCE&G for the Jasper facility was filed in 2001. In the proceeding on the application the Consumer Advocate filed a motion which was

described by the Commission as follows:

> The Consumer Advocate filed a motion which asserts that if the Commission issues the certificate in this matter, it should include a condition that SCE&G evaluate the power purchase option before it requests rate relief.

Order No. 2002-19, p.14, Docket No. 2001-420-E. In ruling on this motion the Commission stated that "[w]e would note that should SCE&G file a rate application including this plant in rate base, the Consumer Advocate will have an opportunity to address this issue during that rate proceeding." Id. p.15. This statement demonstrates that the Commission was not pre-approving Jasper facility costs for recovery in rates. The ruling shows that from the Commission's perspective: (1) it was not a foregone conclusion that SCE&G would file to place those costs in rate base; and (2) that if such an application were to be filed, questions about whether those costs should be placed into the rate base would be addressed at that time.

The next proceeding to consider issues relating to the Jasper facility was Docket No. 2002-223-E in which the Commission allowed into rate base 58% of the cost of the Jasper facility. These costs were allowed as Construction Work in Progress and amounted to $276,224,951. At the time of that proceeding the Jasper facility was not completed and had not begun operations. In response to an argument about the size of the plant the Commission's order provides the following:

> The final point Mr. Phillips raises is his assertion that the Jasper plant is sized larger than currently needed. However, the record shows that even with all CWIP through December 31, 2002, in rates, only 58% of the total cost of the plant will be borne by customers.

Order No. 2003-38, p.32. In this ruling the Commission again focused on the issue before it and decided only that it was appropriate that 58% of the costs of the plant

should be allowed into rate base.

In the present docket SCE&G has clearly asked for approval to place the remaining 42% of the costs of the Jasper facility into rate base. The question presented by this request is whether that investment is – at this time – used and useful. Columbia Energy has properly intervened in this proceeding and has a right to present its position on that issue. It has done so through the testimony of David Dismukes which SCE&G does not want the Commission to hear.

II. ARGUMENT.

The submission of evidence in proceedings before the Commission is governed by R. 103-870 which generally follows the rules of evidence except that those rules may be relaxed "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules...." This rule recognizes that the Commission is a body of experts capable of sifting through evidence which might be thought to confuse a jury. In this case no relaxation of the rules of evidence is required. Rule 402 of the South Carolina Rules of Evidence provides that generally "[a]ll relevant evidence is admissible...." Dismukes testimony is clearly relevant and the motion to strike should be denied.

Although SCE&G does not cite the Rules of Evidence or any cases on evidentiary issues it appears that its argument is that the testimony which is the subject of the motion is irrelevant because of the application of the doctrines of the "law of the case" or collateral estoppel. Neither doctrine applies here and the testimony should be considered in full on the issue of whether the remaining 42% is used and useful.

A. Law of the Case.

SCE&G's principal argument appears to be that Dismukes testimony should be stricken because it is barred by the doctrine of the law of the case. This argument is based on a misreading or misunderstanding of the doctrine. The motion describes the doctrine as precluding relitigation of issues explicitly or necessarily decided in a previous case. SCE&G motion p. 7. In fact the doctrine only applies to decisions made in the same case. See *Ross v. Medical University of S.C.* 328 S.C. 51, 492 S.E.2d 62 (S.Ct. 1997). The doctrine of law of the case has no application to the issues addressed by Dismukes testimony because there have been no rulings in this proceeding which could serve to preclude Columbia Energy from further contesting any issues. This argument by SCE&G simply makes no sense.

B. Collateral Estoppel.

The doctrine of collateral estoppel has no application here either. Collateral estoppel applies to preclude relitigation of issues which were decided in a previous case. SCE&G has completely failed to show that any issues addressed by Dismukes testimony have already been decided in a previous case.

Although the argument which SCE&G is making is completely unsound legally, it is ambitious. In this motion SCE&G asserts that in the previous two proceedings the Commission has already approved the full costs of the Jasper plant and that the Commission has no authority to determine whether at this time the full cost of the Jasper plant should be the responsibility of the ratepayers. As shown above this argument is a mischaracterization of the previous two proceedings. In the Siting Act

case the Commission had the responsibility of assessing the impact of the proposed plant on environmental, tourism, and historical preservation concerns. There is no provision in the Siting Act for a decision that would be binding on future Commissions for ratemaking purposes. Without actually explicitly saying so SCE&G is asking for a novel and sweeping reinterpretation of the Siting Act: under its interpretation an approval under the Act would, years later when the project is completed, require the allowance of the cost of the facility as long as it was completed as planned. This argument is not supported by the Act or by any Commission precedent and should be rejected on its merits at the appropriate time. For present purposes it is clear that such a novel interpretation should be offered directly and fully and not in the form of a stealth motion to strike certain testimony.

SCE&G also argues that the Commission's decision to allow 58% of the costs of the Jasper facility into the rate base was actually a decision to allow 100% of the costs into rate base. This argument makes no sense and again would establish a dangerous precedent which could well serve to tie the hands of the Commission and prevent it from performing its statutory obligation to make decisions in the public interest as demonstrated by the fact and circumstances at the time that a request for recovery in rates is made. In the 2002 case the Commission decided the issue put to it: whether to allow recovery of CWIP representing 58% of the facility. It decided no more than that.

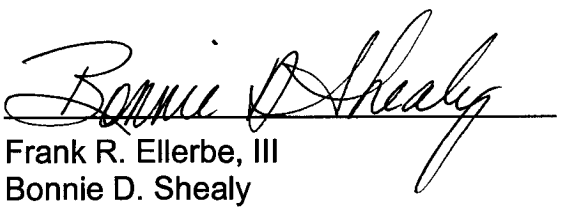
III. CONCLUSION.

The fallacy of SCE&G's arguments is best demonstrated by something it fails to quote. Where is the finding in Order 2003-38 in the 2002 rate case that the Jasper facility was pre-approved in the Siting Act case? If SCE&G is correct in its position that

order should have held that arguments about recovery of Jasper costs were largely moot. In fact, the order makes no such finding but instead decides the issue based on the record presented in that hearing. The same procedure should be followed here. SCE&G has proposed to include 42% of the costs of the Jasper facility into rate base. It successful South Carolina ratepayers will be responsible for over $226 million in additional investment. It is understandable that SCE&G would want to avoid a close examination of the issue but that close examination is the responsibility of this Commission. The testimony of Dismukes will assist the Commission in that task. SCE&G's motion should be denied.

Dated this 28 day of October, 2004.

ROBINSON, MCFADDEN & MOORE, P.C.



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BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-178-E

In Re:	)
	)
Application of South Carolina Electric & Gas Company for Approval of an Increase in Electric Rates and Charges	) **CERTIFICATE OF SERVICE**
	)
	)
	)
	)

This is to certify that I, Mary F. Cutler, a legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below **Columbia Energy LLC's Reply to Motion to Strike of SCE & G** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 28h day of October 2004.

Mary F. Cutler